Office - Supreme Court, U.S.
FILED
AUG 1982
ALEXANDER L. STEVAS,
CLERK

82-267

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 19__

D. J. McCARTHY, Superintendent,

Petitioner,

v.

RUSSELL LEE HINMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GEORGE DEUKMEJIAN, Attorney General
of the State of California
ROBERT H. PHILIBOSIAN,
Chief Assistant Attorney General
--Criminal Division
S. CLARK MOORE,
Assistant Attorney General
SHUNJI ASARI,
Deputy Attorney General
OWEN LEE KWONG,
Deputy Attorney General
and Attorney of Record
3580 Wilshire Boulevard
Los Angeles, CA 90010
Telephone: (213) 736-2106

Attorneys for Petitioner

QUESTIONS PRESENTED

I

Whether 28 U.S.C. § 636(b)(1)(B), which authorizes federal magistrates to conduct evidentiary hearings in habeas proceedings and make report and recommendations to the district court constitutes an unconstitutional delegation of the judicial power under article III and violates principles of comity and federalism?

II

Whether on federal habeas corpus application of federal evidentiary rules relating to the use of non-Mirandized statements for impeachment purposes would render harmless any error in the state court's admission of the statement for all purposes at trial?

III

Whether a federal court, consistent with principles of comity, can disregard a state court's mixed determination of fact and law, reweigh the evidence presented to the state court and make contrary findings, even where the federal court's findings are not based on any newly presented facts.

* * * *

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	1
OPINIONS BELOW	13
JURISDICTION	13
STATEMENT OF THE CASE	14
REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED	16
I CONSIDERATIONS OF COMITY AND FEDERALISM REQUIRE THAT STATE COURT ADJUDICATIONS NOT BE SET ASIDE EXCEPT UPON THE PERSONAL DECISION OF AN ARTICLE III JUDGE WHO HIMSELF HAS CONDUCTED THE HEARING	16
A. Constitutional Constraints	19
B. History	20
C. Federalism	22

TABLE OF CONTENTS
Continued

		PAGE
D.	Due Process	24
E.	Precedent Does Not Support The Delegation Of Article III Duties To Magistrates	26
F.	United States v. Raddatz Does Not Answer Appellant's Due Process Claims	29
	1. The Nature of the Right Involved	29
	2. The Nature of the Proceeding	30
G.	The Raddatz Case Does Not Answer Petitioner's Claims Under Article III	34

TABLE OF CONTENTS
Continued

		PAGE
II	THE FEDERAL COURTS BELOW ERRED IN MAKING FINDINGS CONTRARY TO THE STATE TRIAL COURT WHERE THE FINDINGS WERE BASED ONLY ON A REVIEW OF THE STATE TRIAL TRANSCRIPT	35
III	APPLICATION OF FEDERAL EVIDENTIARY RULES IN SECTION 2254 PROCEEDINGS RELATING TO THE USE OF NON-MIRANDIZED STATEMENTS FOR IMPEACHMENT PURPOSES WOULD RENDER HARMLESS ANY ERROR IN THE STATE COURT'S ADMISSION AT TRIAL OF RESPONDENT'S NONMIRANDIZED STATEMENT FOR ALL PURPOSES	42
CONCLUSION		44

LIST OF AUTHORITIES

CASES	PAGES
Alexander v. Smith (2nd Cir. 1978) 582 F.2nd 212	36
American Insurance Co. v. Canter (1828) 26 U.S. (1 Pet.) 511	27
Broadcast Music v. Havana Madrid Restaurant Corp. (2nd Cir. 1949) 175 F.2d 77	26
Campbell v. United States (1963) 373 U.S. 487	35-36
Crowell v. Benson (1932) 285 U.S. 22	25
DeCosta v. Columbia Broadcasting System, Inc. (1st Cir. 1975) 520 F.2d 499	22
Ellis v. Buchkoe (6th Cir. 1974) 491 F.2d 716	18
Ex Parte Watkins (1830) 28 U.S. 193 (3 Pet.)	31

LIST OF AUTHORITIES
Continued

CASES	PAGES
Flower v. Crouch-Walker Corporation (7th Cir. 1975) 507 F.2d 1378	24
Glidden Company v. Zdanok (1962) 370 U.S. 530	20
Gosa v. Mayden (1973) 413 U.S. 665	27
Hannah v. Larche (1960) 363 U.S. 420	29
Harris v. New York (1971) 401 U.S. 222	42,43
Matthews v. Eldridge (1976) 424 U.S. 319	29
Miranda v. Arizona (1966) 384 U.S. 436	39
National Ins. Co. v. Tidewater Co. (1949) 337 U.S. 582	21
Nevada v. Hall (1979) 440 U.S. 410	20

LIST OF AUTHORITIES
Continued

CASES	PAGES
Palmore v. United States (1973) 411 U.S. 389	27
People v. Fuller (1978) 86 Cal.App. 3d 618	37
People v. Miller (1978) 85 Cal.App.3d 194	32
People v. Pettingill (1978) 21 Cal.3d 231	43
People v. Sirignano (1974) 42 Cal.App.3d 794	36
People v. Taylor (1980) 112 Cal.App.3d 348	37
People v. Terry (1970) 2 Cal.3d 362	36
Rees v. United State Dist. Court, etc., (9th Cir. 1978) 572 F.2d 700	19

LIST OF AUTHORITIES
Continued

CASES	PAGES
Rose v. Mitchell (1979) 443 U.S. 545	33
Swisher v. Brady (1978) 438 U.S. 204	26
Tannier v. Vincent 541 F.2d 932	36
The Mayor v. Cooper (1867) 73 U.S. 247	20
United States Ex Rel. Graham v. Mancusi (2nd Cir 1973) 457 F.2d 463	34
United States v. Delerme (3rd Cir. 1972) 457 F.2d 156	36
United States v. Raddatz (1980) 447 U.S. 667	27,28 29,33, 34
United States v. Saunders (9th Cir. 1981) 641 F.2d 659	27
Washington v. Estelle (5th Cir. 1981) 648 F.2d 276	40

LIST OF AUTHORITIES
Continued

CASES	PAGES
Wingo v. Wedding (1974) 418 U.S. 461	18,19
STATUTES	
U.S. Const., art. I	26
U.S. Const., art. III	16,17, 18,19,20 22,23,24 25,27,28 33,34,45
Art. Conf., Art. IX	20
Fed. Rules Civ. Proc., rule 53	24
Tit. 28 U.S.C. § 636(b)(1)(B)	17,19 27
Tit. 28 United States Code § 2254 subsec. (a)	17,19 22,31, 32,33

LIST OF AUTHORITIES
Continued

MISCELLANEOUS	PAGES
Article III Limits on Article I Court And The 1979 Magistrate Act, (1980) 80 Colum.L.Rev. 560	23
Federalist No. 22 (A. Hamilton)	20
H.R. No. 94-1609, 94th Cong., 2d Sess., reprinted in (1976) U.S. Code Cong. & Admin. News, pp. 6162	24
House Bill No. 94-1609	25
J. Goebel, History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, vol. 1, ch. 5 (O. W. Holmes Devise History, New York: 1971)	21
Pub.L. No. 94-577	25

LIST OF AUTHORITIES
Continued

MISCELLANEOUS	PAGES
Berger, Raoul, Congress v. The Supreme Court (Harv. U. Press 1969) p. 143	30
The Constitution of the United States of America--Analysis and Interpretation, Article III; Judicial Department, pp. 579-790 (U.S. Government Printing Office, Wash. 1973, Supp. 1977)	21
Wright, Miller and Cooper, Federal Practice and Procedure (1975) § 3502, p. 4	24

LIST OF AUTHORITIES
Continued

MISCELLANEOUS	PAGES
1 Farrand, The Records of the Federal Convention (Rev. Ed. 1937) pp. 124-125	21
1976 U.S. Cong. & Admin. News, p. 6163	24

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Ninth Circuit are set forth as Appendices A and B to this petition the suggested opinion is reported as Hinman v. McCarthy (9th Cir. 1982) 676 F.2d 343. The unreported opinion of the District Court for the Central District of California appears as Appendix C to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 16, 1982. A timely petition for rehearing and/or suggestion for rehearing en banc was denied on May 11, 1982. An amendment of opinion was also entered on May 11, 1982. This petition for certiorari was filed within 90 days of that date.

This court's jurisdiction is invoked under Title 28 United States Code section 2254.

* * * *

STATEMENT OF THE CASE

In an information filed by the district attorney of Los Angeles County, respondent was charged in count I with the crime of murder, in violation of California Penal Code section 187. (C.T. p. 1.)[1/] In count II, respondent was charged with the crime of assault with a deadly weapon, in violation of Penal Code section 245(a). (C.T. p. 2.) A jury found respondent guilty of murder in the first degree, and guilty of assault with a deadly weapon. (C.T. p. 106.)

[1/] Hereinafter "C.T." refers to the clerk's transcript and "R.T." will refer to the reporter's transcript of the state trial proceedings, while "C.R." will refer to the clerk's record before the United States Court of Appeals for the Ninth Circuit wherein, each document in the record was identified by number and paginated separately. The record of the state court proceedings were lodged with the district court.

Respondent was sentenced to state prison. Sentences on counts I and II were to run concurrently with each other, with the sentence on count II stayed pending appeal; the stay to become permanent upon the completion of the sentence on count I. (C.T. p. 113.) On October 7, 1976, the California Court of Appeal affirmed the judgment of conviction. On October 26, 1976, respondent's petition for rehearing was denied. On December 2, 1976, respondent's petition for hearing in the California Supreme Court was denied.

On August 8, 1977, respondent filed a petition for writ of habeas corpus in the United States District Court for the Central District of California, and a conditional writ was issued on July 19, 1978. (C.R. Nos. 1, 20, 21.) On October 9, 1979, on appeal to the United States Court of Appeals for the Ninth Circuit, the district court was reversed for failure to permit the petitioner to file objections pursuant to 28 U.S.C. § 636(b)(1)(E). (Appen. E.) On December 31, 1980, the district court conditionally granted a writ of habeas corpus. (C.R. No. 43.)

Petitioner filed a timely notice of appeal. On February 16, 1982, the court

of appeal affirmed the judgment of the district court. (Appen. A.) On May 11, 1982, the court of appeals amended its opinion and denied petitioner's petition for rehearing and for rehearing en banc. (Appen. B.)

On June 28, 1982, petitioner's motion to recall the mandate and for stay of mandate pending application in for writ of certiorari was denied (Appen. D.)

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I

CONSIDERATIONS OF COMITY AND FEDERALISM REQUIRE THAT STATE COURT ADJUDICATIONS NOT BE SET ASIDE EXCEPT UPON THE PERSONAL DECISION OF AN ARTICLE III JUDGE WHO HIMSELF HAS CONDUCTED THE HEARING

The Court of Appeal held that so long as an article III judge - District Court Judge retains the power to review independently the magistrate's fact-findings and recommendations, after an

assignment pursuant to 28 U.S.C. § 636(b)(1)(B)[2/] in a 28 U.S.C. § 2254 proceeding, there is no diminution of the state's right to due process and no subversion of the constitutional objectives of article III. (Hinman v. McCarthy, supra at pp. 346-47.)

Petitioner submits that the Federal Magistrates Act of 1976, amended rule 8(b) of the rules governing title 28 U.S.C. section 2254 cases, and title 28 U.S.C. section 636 et seq. as they provide that magistrates may order and conduct evidentiary hearings and permit magistrates to make reports and recommendations to the

---

2/ "a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the dispositions, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement."

district court are in violation of the United States Constitution as investing judicial authority in officers who are "'outside the pale of article III of the Constitution.'" (See Wingo v. Wedding (1974) 418 U.S. 461, 467, 474.)

Prior to the enactment of the Magistrates Act of 1976 and its progeny, concern regarding delegation to magistrates of duties more properly discharged by article III judges had been expressed by several federal circuit courts. In Ellis v. Buchkoe (6th Cir. 1974) 491 F.2d 716, 717, the Court noted:

> ". . . It is clear to us that in post-conviction cases, the evaluation of an applicant's claim to determine their validity, . . . is a judicial function which the Magistrate's Act did not intend to be exercised by a Federal Magistrate but only by an article III judge. Any different interpretation of the Act could raise serious constitutional questions." (Emphasis added.)

The issue was left open by this court in Wingo v. Wedding, supra, wherein the court noted: "We indicate no views as to the validity of investing such authority [to

hold evidentiary hearings] in a magistrate or other officers 'outside the pale of article III of the Constitution'" (Wingo v. Wedding, supra, 418 U.S. at p. 467, fn. 4) and remains an important one that has yet to be resolved. (See Rees v. United State Dist. Court, etc., (9th Cir. 1978) 572 F.2d 700, 702.)

A. Constitutional Constraints

Article III, section 1, of the United States Constitution provides:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and Inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

The mandate of article III is clear. However, title 28 U.S.C. section 636, as it applies to federal habeas corpus proceedings emanating from a state conviction (28 U.S.C. section 2254) appears to neglect the source of the authority for the utilization of magistrates.

B. History

Under the Articles of Confederation, the central government had but little judicial power. It was this lack of effective judiciary that was a central weakness of the Confederation. (Federalist No. 22 (A. Hamilton); Glidden Company v. Zdanok (1962) 370 U.S. 530, 558.) The system of appeals depended on state courts for enforcement of what was essentially national interests which were often antagonistic to the interests of the states. By necessity, what emerged in the Constitution was article III and the creation of a national Supreme Court. (Moore, supra, § 0.1, p. 3; The Mayor v. Cooper (1867) 73 U.S. 247, 253 (6 Wall.).)

The founding states were vitally interested in the question whether the creation of a new federal sovereign, with courts of its own, would automatically subject them, like lower English lords, to suits in the courts of the "higher" sovereign. (Nevada v. Hall (1979) 440 U.S. 410, 418.) The difficulty lay in the fact that the inferior courts were regarded by the individual states as encroaching upon their rights. It was claimed by the proponents of states' rights that the state

courts were perfectly competent for the work required, and that it would be quite sufficient to grant an appeal from them to the national Supreme Court. (See National Ins. Co. v. Tidewater Co. (1949) 337 U.S. 582, 646-648 (Frankfurther, dissent).)

At the first constitutional convention, in the Committee of the Whole, the proposition "that a national judiciary be established "was unanimously adopted, but the clause "to consist of one supreme tribunal, and one or more inferior tribunals" was first agreed to, then reconsidered, and the provisions for inferior tribunals stricken out, it being argued that state courts could adequately adjudicate all necessary matters while the supreme tribunal would protect the national interest and assure uniformity. (The Constitution of the United States of America--Analysis and Interpretation, Article III, Judicial Department, pp. 583-584 (U.S. Government Printing Office, Wash. 1973, Supp. 1977); 1 Farrand, The Records of the Federal Convention (Rev. Ed. 1937) pp. 124-125; J. Goebel, infra at p. 225.) Eventually, however, the matter was compromised. Inferior courts were not to be required, but the national Legislature

was permitted to establish them.

History clearly supports the notion that the states, although in agreement with the establishment of the supreme tribunal only reluctantly agreed to the permissive establishment of inferior courts while objecting on the grounds that state courts could adequately adjudicate all necessary matters. To the contrary, certainly there is not a clear statement that would permit the broad interpretation given that so directly affect sensitive federal state relation. A fair reading of the history of article III would have the framers rejecting any suggestion that section 2254 proceedings be delegated to less than article III judges, but instead would return this judicial prerogative to the state courts.

C. Federalism

Any suggestion that there is no article III violation where the magistrate is involved only in the fact-finding process and only makes recommendations which are then subject to article III review by the district court judge surely misses the point. (See DeCosta v. Columbia Broadcasting System, Inc. (1st Cir. 1975) 520 F.2d 499, 503-504.) Article III was

created for the very purpose of protecting the state's right to be heard before a particular tribunal.[3/] It has been said that:

> "In a more far-reaching sense, questions of federal jurisdiction are questions of constitutional law. In 1864 former Justice Benjamin Curtis made the still-timely reminder: "Let it be remembered, also, for just now we may be in some danger of forgetting it, that questions of jurisdiction were questions of power as between the United States and the several States.' There is a recurring temptation to view questions of federal jurisdiction as if they were simple procedural questions, to be resolved in whatever fashion will best serve the desirable goal of efficient judicial administration. Settled doctrine does give some play to such considerations. But, when it is remembered that the delicate balance

---

3/ See Note, Article III Limits on Article I Court And The 1979 Magistrate Act, (1980) 80 Colum.L.Rev. 560, 588.

of a federal system is at stake, and that expansion of the jurisdiction of the federal courts diminishes the power of the states, it is apparent that efficiency cannot be the sole or the controlling consideration." (Wright, Miller and Cooper, Federal Practice and Procedure (1975) § 3502, p. 4; fns. omitted; emphasis added.)

D. Due Process

The House Report accompanying section 636(b)(1) states that although the judge must make a "de novo determation" this "is not intended to require the judge to actually conduct a new hearing on contested issues." (H.R. No. 94-1609, 94th Cong., 2d Sess., reprinted in (1976) U.S. Code Cong. & Admin. News, pp. 6162, 6163.) Petitioner submits that the failure to hear anew contested issues of fact or of law denies petitioner the right to due process and to be heard before an article III judge.[4/]

[4/] Concern here, is also addressed to the pro forma referencing of section 2254 matters to magistrates. (Cf. Flower v. Crouch-Walker Corporation (7th Cir. 1975) 507 F.2d 1378, 1380; Fed. Rules Civ. Proc., rule 53.)

As Congress indicated in House Bill No. 94-1609, in discussing section 636(b)(1),

> "Normally, the judge, on application, will consider the record which has been developed before the magistrate and make his own determination on the basis of that record. . . ." (Pub.L. No. 94-577; 1976 U.S. Cong. & Admin. News, p. 6163.) However in Crowell v. Benson (1932) 285 U.S. 22, 64, the Supreme Court insisted that constitutional claims be subject to full de novo determination by article III fact finders following initial review by a non-article III commissioner, for ". . . the essential independence of the exercise of the judicial power of the United States . . . requires that the Federal court should determine such an issue upon its own record and the facts elicited before it."

It was recently reemphasized:

> "'To experienced lawyers it is commonplace that the outcome of a lawsuit -- hence the vindication of legal rights -- depends more often on how the factfinder appraises the facts

than on a disputed construction of a statute [or interpretation of a line of precedents]. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied.'" (Emphasis added; Swisher v. Brady (1978) 438 U.S. 204, 230 (dis. opn., Marshall, J.).)

It has been colorfully put that:

". . . A 'stenographic transcript correct in every detail fails to reproduce tones of voices and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried.'" (Broadcast Music v. Havana Madrid Restaurant Corp. (2nd Cir. 1949) 175 F.2d 77, 80.)]

E. Precedent Does Not Support The Delegation Of Article III Duties To Magistrates

Congress has properly established article I or legislative courts that need not comply with the requirements of article

III. (See, e.g., Palmore v. United States (1973) 411 U.S. 389 (an article III judge was not needed for the District of Columbia was not a state but uniquely within the umbrella of article I, section 8, clause 17); Gosa v. Mayden (1973) 413 U.S. 665, 673-674 (military); American Insurance Co. v. Canter (1828) 26 U.S. (1 Pet.) 511, 546 (territorial court derived its power not from article III but from the plenary power Congress had over its territories). However such courts have been upheld only when their jurisdiction is limited to the territories, to local matters arising in the District of Columbia and to limited subject matters. (United States v. Saunders (9th Cir. 1981) 641 F.2d 659, 663, cert. denied, 452 U.S. 918 (1981).) "Inherently judicial" tasks, however, must be performed by article III judges. (Id.)

Recognizing this limitation, the court of appeals decision nonetheless, relies upon United States v. Raddatz (1980) 447 U.S. 667, 681-684 which allowed magistrates to perform "inherently judicial" task when they do so under the supervision of an article III judge in support of the position that section 636(b)(1)(B) is constitutional. Such reliance is misplaced.

In Raddatz, the Supreme Court upheld the constitutionality of section 636(b) only insofar as it authorized United States magistrates to conduct hearings in criminal matters on motions to suppress evidence. The court noted that because of the nature of the issues presented and the interests implicated in a motion to suppress evidence by a federal prisoner facing federal criminal charges, (1) due process does not require that a district judge actually hear the challenged testimony, and (2) the delegation of the function to hear motions to supress by a non-article III officer is not in violation of article III so long as the ultimate decision is made by the district court.

In regards to the due process, the Supreme Court found that the process due at a suppression hearing which is not concerned with the ultimate issues of fact as to guilt or innocence may be constitutionally less demanding and elaborate than the protections accorded to a defendant at a trial. The court reasoned that the interests at stake in a voluntariness hearing (in the context of a motion to suppress) do not coincide with the criminal law objective of determining guilt or innocence. In

addition, the court remarked that the interest at stake in a suppression hearing are of a lesser magnitude than those in a criminal trial itself. (Id., at p. 677-681)

F. United States v. Raddatz Does Not Answer Appellant's Due Process Claims

Due process is a flexible concept and requires such procedural protections as the particular situation demands. (Matthews v. Eldridge (1976) 424 U.S. 319, 334.) It may be evaluated in the context of:

> "The nature of the alleged right involved, the nature of the proceeding, and the possible burden on the proceeding . . . ." (Hannah v. Larche (1960) 363 U.S. 420, 442; see also U.S. v. Raddatz, supra, 43 L.W. at p. 4816.)

An analysis of these factors clearly demonstrates why the particular right claimed by the state in a section 2254 hearing must be confirmed.

1. The Nature of the Right Involved

It is the right of the state to be subject to solely the jurisdiction of an article III judge in a section 2254 proceeding that is at issue. In every sense

of the word such right goes to the heart of state-federal relationships.

The importance of this right and the balance it should take is well documented. At the time of the adoption of the Constitution persons favoring States' Rights were opposed to the creation of inferior federal courts with the power to review state judgments. (Berger, Raoul, Congress v. The Supreme Court (Harv. U. Press 1969) p. 143.) It was this opposition that ultimately led to the deletion from the Constitution of any provision for inferior federal courts and the subsequent adoption of the Madison-Wilson compromise motion to make the creation of inferior federal courts a question for Congress. (Id. at pp. 270-271; see also Id. at pp. 135, 141-42.) The framers on the Constitution had expected the review of practically all state cases to be conducted by the Supreme Court. (Id. at p. 270 n 215.)

2. The Nature of the Proceeding

Title 28 United States Code section 2254 subsection (a) provides that the federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to

the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." The effect of a section 2254 proceeding is an extraordinary intrusion into a state court's judicial process.[5/] The scenario to a section

---

[5/] As Chief Justice Marshall noted in Ex Parte Bollman (1807) 8 U.S. 75, 97:

> "The State courts are not, in any sense of the word, inferior courts, except in the particular cases in which an appeal lies from their judgment to this court."

Since the Great Writ of Habeas Corpus was designed to provide judicial intervention, when necessary, to assure against confinement without cause by the executive branch, and since a final judgment of conviction in a court of general jurisdiction constitutes a valid determination of cause for confinement (Ex Parte Watkins (1830) 3 Peters 193, 201-202), habeas corpus should not be entertained under section 2254 absent a showing that state procedures are so inadequate as to amount to a suspension of the writ or a denial of due process.

2254 proceeding has been described as:

> "'Conviction in the state courts now has become merely the starting point of interminable litigation. State appeals are followed by successive petitions for federal habeas corpus and successive federal appeals. What is involved is a repetitious, indefinite, costly process of judicial screening, rescreening, sifting, examining and reexamining of state criminal judgments for possible constitutional error. . . . No other nation in the world has so little confidence in its judicial systems as to tolerate these collateral attacks on criminal court judgments. . . . This comparatively new concept of federal habeas corpus has dangerously prejudiced the delicate balance of federal-state relations and has seriously degraded the authority of the states and their judicial tribunals.'" (People v. Miller (1978) 85 Cal.App.3d 194, 199.)

Section 2254 which in effect permits district judges to substitute their views for the collective considered judgments and wisdom of the Supreme Court of

the State of California, and section 636(b) which permits a United States magistrate to do the same, certainly has the effect of eroding the faith of the citizens of California in the authority of the California Supreme Court in particular and in the reasonableness of the state judicial process in general. The review by a magistrate of the reasoned and collective judgment of state courts differed so fundamentally from the ruling on a motion to suppress what does not consent itself with ultimate facts that the reasoning of Raddatz should not be extended to deny the state the right to have their judgment. Reviewed solely by an article III judge. (Rose v. Mitchell (1979) 443 U.S. 545, 579-80, Powell, J. concurring.)

Furthermore, legal practitioners involved in habeas corpus matters brought under section 2254 are painfully aware of the difficulties of conducting evidentiary hearing in habeas corpus cases where the facts are stale, witnesses difficult to locate and, when they are found, their memories dimmed by the passage of time. In this respect, the personal observation of an article III judge of a witness' demeanor takes on greater significance than that of

a suppression hearing which would be more contemporaneous to the events. (Note, United States Ex Rel. Graham v. Mancusi (2nd Cir 1973) 457 F.2d 463, 469-70.)

G. The Raddatz Case Does Not Answer Petitioner's Claims Under Article III

The Court of Appeals' reliance on Raddatz for support on the article III question is also misplaced.

Raddatz places great weight on the fact that the entire criminal process takes place under the district court's total (but not direct and immediate) control and jurisdiction and that the delegation does not violate article III so long as the ultimate decision is made by the district court. (U.S. v. Raddatz, supra at p. 681.) The ultimate decision, in Raddatz however, concerns itself merely with the question whether there was an unreasonable search or seizure, not with ultimate issues of fact going to the question of guilt or innocence or the correctness of the collective judgment of the state courts. Petitioner notes that a similar explanation that the ultimate decision is really made by the Court of Appeal or even subsequently by the Supreme Court might also be given. However

this explanation does not satisfy the fundamental problem that questions of credibility cannot effectively be determined on a dry, written record.

Moreover, the issue in the instant case is whether through either article I or through article III pursuant to its discretionary powers to create courts, contravene and discount the clear intent of the framers by delegating authority in effect to overturn the holding of a state supreme court to non-article III personnel. Petitioner submits that such was not the intent of the framers.

II

THE FEDERAL COURTS BELOW ERRED IN MAKING FINDINGS CONTRARY TO THE STATE TRIAL COURT WHERE THE FINDINGS WERE BASED ONLY ON A REVIEW OF THE STATE TRIAL TRANSCRIPT

Petitioner submits that there was overwhelming evidence, apart from the tainted evidence, to support respondent's conviction under a theory of felony-murder. Initially it should be noted that since the question posed is one of fact, it should not have been disturbed unless the State's determination was found to be clearly erroneous. (See Campbell v. United

States (1963) 373 U.S. 487, 493.) Situations involved in findings of fact concerning other than a determination of guilt require the application of the "clearly erroneous" standard. (United States v. Delerme (3rd Cir. 1972) 457 F.2d 156, 159; 28 U.S.C. § 2254(d) (applicant must establish by convincing evidence).)

In this regard, the State Court's finding that the introduction of the non-Mirandized statement was harmless beyond a reasonable doubt should have been viewed by the lower federal courts as presumptively correct. (Alexander v. Smith (2nd Cir. 1978) 582 F.2nd 212, 219, cert. denied, 439 U.S. 990 (1978); Tannier v. Vincent 541 F.2d 932, 937 (2nd Cir. 1976), cert. denied 429 U.S. 1065 (1977).)

California courts hold that all persons aiding and abetting the commission of a robbery are guilty of first degree murder when one of them kills while acting in furtherance of the common design. (People v. Terry (1970) 2 Cal.3d 362, 401.) The intent to commit the felony must be formed prior to the time of the killing and may be proved by circumstantial evidence. (People v. Sirignano (1974) 42 Cal.App.3d 794, 801.) However, a strict

causal relation between the felony and the killing is not required. It is sufficient if both are part of one continuous transaction. (People v. Fuller (1978) 86 Cal.App.3d 618, 623.) For example there is no requirement that the homicide occur while committing or while engaged in the felony or that the killing be part of the felony. It is sufficient that the homicide be related to the felony and have resulted as a natural and probable consequence thereof. (People v. Taylor (1980) 112 Cal.App.3d 348, 358.)

On the morning of June 19, 1975, respondent, Michael Kicklighter, Richard Gutierrez and David Harger, were walking down Lomita Boulevard. (R.T. p. 107-108.) One of them broke into a Pinto automobile. (R.T. p. 120.) When they left, they threw a brick through its window. (R.T. pp. 65-67.) The assault victim, Glen Greene, had observed all this from his apartment and went outside to investigate. He stated he intended to call the police. (R.T. p. 75.) Respondent responded, "What about?" Mr. Greene told respondent about the breaking of the window and said, "Somobody is going to call the police." Respondent, who was sober, called out and

his companion came over. They started fighting with Mr. Greene. (R.T. p. 78-83.) Respondent asked Mr. Greene if he wanted to get stabbed. (R.T. p. 83.) Mr. Greene fled towards his apartment building, and the four assailants followed. (R.T. p. 85, 87.) Harry Hopkins, the victim of the homicide, was standing at the front door when Mr. Greene had just been stabbed in the back by respondent. (R.T. pp. 90-91.) He was stabbed in the back and was bleeding badly. (R.T. pp. 94-95.) Bleeding badly, Mr. Greene escaped into his apartment. (R.T. p. 94-96.)

Mr. Hopkins apparently barred respondent and his companions from entering the apartment. (R.T. pp. 149-153, 173.) For his troubles, they held him down and stabbed him to death with a knife. (R.T. pp. 155-160, 180.) Mr. Hopkins' hand had been pinned behind him and he was on his knees when knifed. (R.T. p. 180.) Respondent stabbed Mr. Hopkins. (R.T. pp. 188-189, 301-303, 308.)

Mr. Hopkins had $200 in his wallet. (R.T. pp. 170-171.) It was missing after the incident. (R.T. p. 343.) At about 1:30 a.m., Rick Gutierrez gave Deborah Waller a wallet to put away. (R.T. pp. 326-327.)

On June 19, 1975, Michael Kicklighter, after waiving his Miranda rights, made statement to the police (R.T. pp. 359-360) implicating David Harger and Richard Gutierrez in the incident. That same day, Mr. Gutierrez also gave a statement to the police after he waived his Miranda rights (R.T. p. 364). He implicated respondent, David Harger and Michael Kicklighter.

The conversation between Sergeant Trinkler and respondent that was admitted over a Miranda objection is as follows:

> ". . . All I said to him was, 'why did you run?' He said, 'My friends were going to rob this man' that he said he thought got out of a pickup truck. 'I didn't want to be associated in the robbery.' Then I asked him who were the friends, what were the names of the friends that were involved in the robbery, and who cut the victim. He said that Ricky Gutierrez was the suspect that cut the victim and the other was Mike Kicklighter and he was the one that held the victim. At that time I observed that he had two fairly large blood stains on the front of his t-shirt and they were glistening,

fresh, wet blood stains. I noted that when I got him out into the street light these blood stains existing on his clothing, and I asked him where he was. He said that he was in the middle of the street, watching from that point and that this was happening on the sidewalk, on the south sidewalk. At that point, I determined that he was obviously -- there was a discrepancy in his story, being that the blood was fresh on his clothing. That's all I asked him." (R.T. pp. 216-217, 223-224, 238-239.)

It is well settled that the admission of prejudicial evidence can justify habeas corpus relief only if the error was material in the sense of being crucial, critical, and a highly significant factor. (Washington v. Estelle (5th Cir. 1981) 648 F.2d 276, 279.) Respondent maintains that the evidence was non-prejudicial and even if it was prejudicial, it was not material.

It should be remembered that respondent's non-Mirandized statement was exculpatory. Respondent stated that "[He] didn't want to be associated in the robbery." Petitioner made no admission of

guilt. Instead he implied indirectly that his friends were the robbers and merely disclosed that Mr. Gutierrez cut the victim while Mr. Kicklighter held him. Revealingly, the police did not identify which victim they were talking about in their questioning of petitioner. The evidence showed that there were two victims; Mr. Greene and Mr. Hopkins, both of whom were cut. Moreover, respondent never identified the robbers. When asked who was involved in the robbery, respondent merely answered with the names of the persons who had cut the victim. Therefore, the effect, if any, of respondent's statement on the jury as it related to the robbery had to be minuscule at most since it was uninformative.

Thus, even if the admission into evidence of the non-Mirandized statement was prejudicial, it was not the type of statement which is material in the sense of being crucial, critical and of a highly significant factor.

III

APPLICATION OF FEDERAL EVIDENTIARY RULES IN SECTION 2254 PROCEEDINGS RELATING TO THE USE OF NON-MIRANDIZED STATEMENTS FOR IMPEACHMENT PURPOSES WOULD RENDER HARMLESS ANY ERROR IN THE STATE COURT'S ADMISSION AT TRIAL OF RESPONDENT'S NON-MIRANDIZED STATEMENT FOR ALL PURPOSES

Petitioner submits that respondent's non-Mirandized statement to the police that his two friends were going to rob Hopkins even though there was no limiting instruction (see Harris v. New York (1971) 401 U.S. 222) to the jury must be considered as proper as impeaching evidence in the habeas corpus proceeding.

The court of appeals held that since "[t]here was no proper instruction advising the jury of the limited use of the statement," it was improperly admitted. The appellate court in that light then reviewed the evidence generated in the state trial below, but failed to consider the impeaching effect of respondent's non-Mirandized statement in resolving whether its introduction was harmless beyond a reasonable doubt.

It is granted that under Harris a limiting jury instruction should have been

given. But the reality is that such a jury instruction would never be given to a California jury, since non-Mirandized impeaching evidence is inadmissible in California. (People v. Pettingill (1978) 21 Cal.3d 231, 237.) The inadmissiblity of this evidence for all purposes at trial because of California's former unique evidentiary rules does not permit federal courts in habeas corpus from considering the statements for impeachment purposes in the habeas corpus proceeding. (Harris v. New York, supra at p. 224.)

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury." (Harris v. New York, supra at p. 225.) "The shield provided by Miranda cannot be perverted into a license to use free from the risk of confrontation with prior inconsistent utterances." (Id. at p. 226.) The failure of the lower federal courts in this case is further evidence in support of petitioner's assertion that the determinations of the California courts have not been given due weight in the instant matter.

CONCLUSION

For the foregoing reasons, it is urged that the petition for writ of certiorari be granted.

Respectfully submitted,

GEORGE DEUKMEJIAN, Attorney General
of the State of California
ROBERT H. PHILIBOSIAN,
Chief Assistant Attorney General
--Criminal Division
S. CLARK MOORE,
Assistant Attorney General
SHUNJI ASARI,
Deputy Attorney General
OWEN LEE KWONG,
Deputy Attorney General
and Attorney of Record